

APPEAL NO. 052892
FILED FEBRUARY 9, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 18, 2005, with the record closing on November 10, 2005. The hearing officer resolved the disputed issue by deciding that the appellant (claimant) did not have good cause for her failure to attend or reschedule the designated doctor's examination on March 31, 2005, and consequently, she is not entitled to temporary income benefits (TIBs) for the period from April 5 through April 27, 2005, pursuant to 28 TEX. ADMIN. CODE §130.6(c)(3) (Rule 130.6(c)(3)). The claimant appeals, arguing that the hearing officer's determination is against the great weight and preponderance of the evidence, is in error and should be reversed because it is not supported by legally sufficient evidence, and incorrectly interprets and applies the applicable provisions of the Texas Labor Code. The respondent (carrier) responds, urging affirmance. The carrier contends that the hearing officer's determination is supported by the evidence.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. It was undisputed that the claimant's initial appointment with the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor was set for March 29, 2005, at 10:00 a.m. The claimant testified that approximately 1 hour prior to the March 29th scheduled appointment she received a call from the designated doctor's office to reschedule the appointment due to a conflict of the designated doctor.

Rule 130.6(b) provides that the designated doctor and the injured employee shall contact each other if there exists a scheduling conflict for the designated doctor appointment. The rule further provides that whoever has the conflict must make contact at least 24 hours prior to the appointment unless it is an emergency situation. The rescheduled examination is to be set for a date within 14 days of the originally scheduled examination unless an extension is granted by the Division's field office. No evidence was presented at the CCH regarding the reason the designated doctor had to reschedule the examination.

The claimant testified that during the phone conversation with the designated doctor's office on March 29th, an alternative date of March 31st was proposed by the designated doctor's office. The claimant informed the designated doctor's office that she had a previously scheduled appointment with another doctor on that date and therefore March 31st was not a good alternative date for rescheduling the appointment. The employee from the designated doctor's office responded that they would "get back with her [the claimant] concerning another date." In evidence was a report dated March

31, 2005, which indicated that the claimant did in fact attend a doctor's appointment on that date for injuries she sustained in the course and scope of her employment. The evidence indicated that an adjuster with the carrier informed the designated doctor's office that the claimant should be told to cancel her previously scheduled appointment and that the designated doctor's appointment should be rescheduled for March 31, 2005. The hearing officer found that a message was left on the claimant's answering machine on March 30, 2005, informing the claimant that the designated doctor's appointment had been set for March 31, 2005. The hearing officer found that the claimant did not act like an ordinarily prudent person under the same or similar circumstances when she failed to reschedule or attend the March 31, 2005, appointment set with the designated doctor after a message had been left for the claimant on March 30, 2005, regarding the appointment.

Rule 130.6(c) provides that an insurance carrier may suspend TIBs if an injured employee, without good cause, fails to attend a designated doctor examination. Section 408.0041(h), effective for the time period at issue in this case, provides that the Commission [now known as the Division] may order TIBs be paid for the period for which the Commission determined that the employee had good cause and that the Commission by rule shall ensure that the employee receives reasonable notice of an examination and the insurance carrier's basis for suspension; and that the employee is provided a reasonable opportunity to reschedule an examination for good cause. Good cause is a question of fact for the hearing officer to resolve. Appeals Panel Decision (APD) 941656, decided January 26, 1995. The test for good cause is that of ordinary prudence; that is, the degree of diligence an ordinarily prudent person would have exercised under the same or similar circumstances. APD 94244, decided April 15, 1994.

In the instant case the initial designated doctor's appointment had to be rescheduled due to a conflict of the designated doctor. The evidence indicated that the contact to reschedule the initial appointment occurred approximately 1 hour prior to the originally scheduled appointment time, not 24 hours as required by Rule 130.6(b). Further, the evidence reflected that the designated doctor's office was aware that the claimant had a conflict on March 31, 2005, prior to re-scheduling the appointment for March 31, 2005. Potential adverse consequences also faced the claimant if she failed to attend a health care appointment concerning her compensable injury. Rule 130.4(b) provides that if maximum medical improvement (MMI) has not been certified and statutory MMI has not been reached, the carrier shall presume that an employee has reached MMI if it appears that the employee has failed to attend two or more consecutively scheduled health care appointments and the number of days between the two examinations is greater than 60. Under the facts as presented in this case, the hearing officer's determination that the claimant did not act like an ordinarily prudent person under the same or similar circumstances when she failed to reschedule or attend the March 31, 2005, appointment set with the designated doctor after a message was left for the claimant on March 30, 2005, is against the great weight and preponderance of the evidence. We reverse the hearing officer's determination that the claimant did not have good cause for her failure to attend or reschedule the designated

doctor's examination on March 31, 2005, and consequently is not entitled to TIBs from April 5 through April 27, 2005, and render a new determination that the claimant did have good cause for her failure to attend or reschedule the designated doctor's examination on March 31, 2005, and that the claimant is entitled to TIBs from April 5 through April 27, 2005.

The hearing officer's decision and order are reversed and a new decision rendered that the claimant did have good cause for failing to attend the designated doctor's appointment on March 31, 2005, and that the claimant is entitled to TIBs from April 5 through April 27, 2005.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**NAME
STREET
CITY, TEXAS ZIP CODE.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge